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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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IN THE MATTER OF DISSEMINATION OF
INDIVIDUAL CUSTOMER PROPRIETARY
NETWORK INFORMATION BY TELECOM-
MUNICATIONS CARRIERS

Docket No. RT-00000J-02-0066

**ARIZONA WIRELESS CARRIERS GROUP'S
APPLICATION FOR REHEARING OF DECISION NO. 68595**

Pursuant to A.R.S. § 40-253, the Arizona Wireless Carriers Group¹ (collectively, "Wireless Carriers") submits this joint Application for Rehearing and Reconsideration of Decision No. 68595 (March 23, 2006) (the "Decision") adopting amended rules concerning dissemination of customer proprietary network information ("the Arizona CPNI rules" or "Rules"). The Wireless Carriers respectfully request that the Arizona Corporation Commission (the "Commission") grant this Application and modify Decision No. 68595 with respect to the CPNI Rules.

GROUND FOR REHEARING

The underlying record in this Docket does not demonstrate any need or justification for the proposed Arizona CPNI rules. Rather, the record is clear that Arizona customers are protected adequately by the existing Federal CPNI Rules--as illustrated by the virtual lack of any Arizona CPNI complaints on file with the ACC since the current Federal CPNI Rules went into effect and the lack of CPNI complaints at the various public hearings throughout the state. The adoption of these rules will only add expense, without providing any needed protections to Arizonans. Further, the Arizona CPNI rules adopted as amended in Decision No. 68595 are legally and

¹ For purposes of this application, the Arizona Wireless Carriers Group consists of Alltel, Cingular Wireless, Sprint Nextel Corporation (Sprint Spectrum L.P. d/b/a Sprint and Nextel West Corp. d/b/a Nextel), Cricket, Verizon Wireless and VoiceStream PCS III Corporation d/b/a T-Mobile.

1 factually flawed. First, the Arizona CPNI rules violate both the First Amendment of the United
2 States Constitution and Article 2, Section 6 of the Arizona Constitution by unconstitutionally
3 restricting commercial speech. Second, the Commission has exceeded its powers and authority in
4 enacting such rules. Third, the Rules interfere with interstate commerce as the rules purportedly
5 apply to both intrastate and interstate services. Fourth, the Commission lacks jurisdiction to
6 regulate wireless carriers. Fifth, the Rules are inconsistent with the Federal CPNI Rules. Sixth,
7 the Rules are unclear and confusing. Seventh, Decision No. 68595 fails the restrictions of A.R.S.
8 §§ 41-1022 and 41-1025 regarding amendments to noticed rule makings.

9 **1. The Record Does Not Support the Need for Arizona-Specific CPNI Rules.**

10 The underlying record in this Docket does not provide any evidence that Arizona-specific
11 CPNI rules are needed. Indeed, the record does not include any Arizona customer complaints
12 about the misuse of CPNI which occurred in the four years since this rule-making docket was
13 opened. Instead, Appendix B to the Decision notes that “the CPNI Rules were promulgated as a
14 direct result of concern on the part of the Corporation Commission, and more importantly, on the
15 part of customers, regarding a 2001 mailing by Qwest to its customers regarding use of their
16 CPNI.” *See* Decision, Appendix B, p. 11. That Qwest mailing and the subsequent January 16,
17 2002 open meeting occurred before the current Federal CPNI Rules went into effect on October
18 21, 2002. *See* 67 FR 59211 dated September 20, 2002, adopting 47 CFR 64.2001-2007. In this
19 Docket, the Commission went to extraordinary lengths to gather public input concerning CPNI,
20 holding public meetings in Phoenix, Mesa, Prescott, Sun City, Flagstaff, Kingman, Lake Havasu
21 City, Yuma, Sierra Vista, Bisbee, Wilcox, and Benson. In all of those meetings, the ACC did not
22 receive any complaints about use or treatment of CPNI.

23 Moreover, at the November 8, 2005 Open Meeting, the Commission’s Consumer Services
24 Section indicated that since the Qwest incident in late 2001, it had received virtually no CPNI-
25 related complaints. This admission confirms the Commission’s data responses in this docket
26 which indicate that since the effective date of the federal rules in September of 2002, this
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1 Commission has not received any complaints about specific CPNI misuse. *See Staff's Notice of*
2 *Filing Responses to Arizona Wireless Carriers*, filed April 13, 2005; *Comments of Arizona*
3 *Wireless Carriers Group on Staff's Notice of Filing*, filed April 25, 2005. Given the lack of
4 evidence of CPNI misuse since the implementation of the federal CPNI rules, the federal CPNI
5 rules are more than sufficient to protect CPNI. There is no need for Arizona-specific CPNI rules at
6 this time.

7 **2. The Decision and Arizona CPNI Rules Violate the First Amendment of the**
8 **United States Constitution and Article 2 §6 of the Arizona Constitution.**

9 In order to survive a First Amendment challenge, the Decision and the Arizona CPNI rules
10 must be evaluated against the commercial-speech analysis set forth in the Supreme Court's
11 decision in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557
12 (1980), which places on the government the burden of proving (1) it has a substantial interest in
13 regulating the commercial speech in question, (2) that the regulation directly and materially
14 advances that interest, and (3) that the regulation is no more extensive than necessary to serve that
15 interest. The Decision does not pass this test.

16 The FCC's original CPNI rules, issued in 1998, included an opt-in requirement. In *U S*
17 *WEST v. FCC*, the Tenth Circuit applied the *Central Hudson* test to the FCC's original opt-in
18 requirements and found them to be an unconstitutional restriction on commercial speech. *U S*
19 *WEST, Inc. v. Federal Communications Comm'n*, 182 F.3d 1224, 1233 (10th Cir. 1999). In 2003,
20 the federal District Court in Seattle followed the *U.S. West* decision in striking down Washington
21 State regulations requiring customer "opt in" as a condition to any non-billing use of certain types
22 of CPNI. *See Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003).

23 The Arizona Commission has attempted to cloak its opt-in requirement as a verification of
24 an opt-out requirement; however, this is a distinction without a difference. The "verification"
25 procedure is effectively an "opt in" requirement by another name as it requires the customer to go
26 to elaborate lengths to "verify" that he or she really does consent to the dissemination of his or her
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1 CPNI -- changing the name of such a procedure does not negate the requirement's constitutional
2 flaw. The Tenth Circuit recognized this distinction as critical to the First Amendment analysis.
3 As recognized by the Court, an "opt in" regime requiring an affirmative expression of consent
4 from the customer imposes a much greater restriction on speech than an "opt out" regime because
5 customers are more likely to decline to raise an affirmative objection to the use of CPNI than they
6 are to take the trouble of affirmatively consenting to it. *U.S. West v. FCC*. In order to adopt such a
7 requirement the Arizona Commission would need to demonstrate that the rules meet the *Central*
8 *Hudson* test which it has failed to do. Despite a yeoman's effort, the Commission has been unable
9 to develop a record of any specific harms experienced by Arizonans. Given this, the Commission
10 cannot develop narrowly tailored rules with only speculative harms as the starting point.

11 In *U S WEST v. FCC*, the court concluded that the FCC opt-in requirement was not
12 "narrowly tailored" because the agency had not demonstrated a sufficiently good fit between the
13 means chosen (opt-in or express approval) and the desired statutory objectives (protecting privacy
14 and competition). As determined by the Tenth Circuit, the FCC failed to consider adequately the
15 "obvious and less restrictive alternative" of an opt-out strategy. *Id.* at 1238. Similarly, the
16 Commission, has not met its burden of showing that it has a substantial interest justifying the
17 restrictions on constitutionally-protected speech imposed by the Decision and CPNI Rules.

18 The right to speak freely, without government restriction, enjoys even greater protection
19 under the Arizona Constitution. See *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257,
20 418 P.2d 594 (1966). Under Article 2, §6 of the Arizona Constitution, any regulations affecting
21 speech "must regulate with narrow specificity so as to affect *as little as possible* the ability of the
22 sender and receiver to communicate." *Mountain States Telephone and Telegraph Company v.*
23 *Arizona Corporation Commission*, 160 Ariz. 350, 352, 773 P.2d 463, 457 (1989). In *Mountain*
24 *States*, the plaintiff challenged a Commission order approving a pre-subscription requirement that
25 effectively restricted customer access to "Scoopline" telephone service. The Court struck down
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1 the pre-subscription requirement which, like the Commission's Arizona CPNI rules, implicated
2 both general free speech concerns and commercial speech.

3 Under the First Amendment and under Article 2, § 6 of the Arizona Constitution, the
4 Arizona CPNI rules and the Decision are unlawful and should be reconsidered by the Commission.
5 Further, the Commission's reliance on Article 2, § 8 of the Arizona Constitution is misplaced.
6 Article 2, § 8 does not override the effect of Article 2, § 6 or the First Amendment of the United
7 States Constitution. To the extent there is any conflict between Article 2, § 8 and application of
8 the First Amendment to the speech in question, the First Amendment will prevail pursuant to the
9 Supremacy Clause contained in Article VI of the United States Constitution.

10 **3. The Decision Violates the Commerce Clause of the United States Constitution.**

11 The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate
12 Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has
13 unequivocally held that the Commerce Clause prevents one State from interfering with the
14 "legitimate regulatory regimes of other States," *Healy v. Beer Inst., Inc.*, 491 U.S. 324 at 336
15 (1989), from attempting "to control conduct beyond the boundaries of the State," *id.*, and from
16 "project[ing its] regulatory regime into the jurisdiction of another State." *Id.* at 337. These
17 fundamental principles of independent State sovereignty also require that "no single State . . .
18 impose its own policy choice on neighboring States" and direct that State courts must be
19 "constrained by the need to respect the interests of other States" in adjudicating matters that affect
20 commerce outside their borders. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996).

21 The Commerce Clause of the U.S. Constitution precludes the Commission from imposing
22 these new Arizona CPNI rules when to do so would inevitably control conduct of carriers and
23 customers outside Arizona and would burden interstate commerce unnecessarily.

24 **4. The Commission Lacks Authority to Impose CPNI Rules on Wireless Carriers.**

25 The Commission has no Constitutional or statutory authority expressly permitting the
26 regulation of wireless service providers. Further, the Commission derives its basic jurisdiction
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1 over public service corporations from art. 15, § 3 of the Arizona Constitution, which empowers the
2 Commission to prescribe just and reasonable rates. Under federal law, the Commission has no
3 authority to regulate the entry of, or the rates charged by, a wireless service provider. 47 U.S.C. §
4 332(c)(3)(A). The Commission has exceeded its Constitutional and statutory authority in
5 promulgating CPNI rules that impact the private contracts between wireless carriers and their
6 customers.

7 **5. The Commission Lacks Authority Under the Arizona Constitution and**
8 **Statutes to Enact the Arizona CPNI Rules.**

9 In the Decision and the Rules, the Commission has exceeded its authority. The
10 Commission's powers "do not exceed those to be derived from a strict construction of the
11 Constitution and implementing statutes." *Williams v. Pipe Trades Indus. Program of Arizona*, 100
12 Ariz. 14, 17, 409 P.2d 720, 722 (1966) (emphasis added). Article 15 of the Arizona Constitution
13 authorizes the Commission to prescribe "just and reasonable rates and charges" (Section 3), to
14 inspect and investigate public corporations (Section 4), and to issue certificates of incorporation
15 and licenses (Section 5). In issuing the Decision and promulgating the Rules, the Commission has
16 exceeded its constitutional and statutory powers.

17 **6. The Arizona CPNI Rules are Inconsistent with the Federal Rules.**

18 The Arizona CPNI Rules constitute and arbitrary and capricious interpretation of the
19 controlling provision of 47 U.S.C. §222 and are impermissible because they are preempted under
20 47 U.S.C. §222, and the Supremacy Clause, Article 6, clause 2 of the United States Constitution.
21 The current applicable federal CPNI rules, 47 C.F.R. 64.2001-2009, became effective on
22 September 20, 2002. These are comprehensive rules and provide specific requirements for sharing
23 CPNI with affiliates and third parties. The Commission has failed to produce evidence of residual
24 harms not addressed by the federal CPNI rules and show that additional regulations would not
25 burden speech. Thus, there is simply no reason for the Commission to promulgate additional
26 rules, especially when there has been no CPNI complaint filed with the Commission since the
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1 FCC's rules were promulgated. The Arizona Rules in some instances contradict the federal rules,
2 and thus are inconsistent with the federal rules and would be pre-empted by the conflicting federal
3 CPNI rules. For example:

- 4 • As discussed above, the Arizona Rules allow "opt-out", approval of use of CPNI, but
5 then they require the carrier to "verify" the "opt-out" approval within one year,
6 effectively changing the "opt-out" to an "opt-in."
- 7 • Additional requirements on opt-in notices including font size; printing notices in
8 English and Spanish; method of delivery to customer; and require a confirmation to the
9 customer in writing within 10 days.
- 10 • Proprietary agreements must be entered into with affiliates for sharing CPNI even
11 though the FCC specifically considered and rejected this requirement.
- 12 • Carriers must notify customers annually of that customer's current election regarding
13 treatment of his/her CPNI. No such requirement appears in the federal rules.

14 **7. The Rules are Unclear and Confusing.**

15 Arizona law requires administrative rules to be "[c]lear, concise and understandable."
16 A.R.S. § 41-1044(B)(2). The federal and Arizona Constitutions' due process provisions also
17 require that regulated entities not be subjected to rules that are unduly vague. The Arizona CPNI
18 rules contravene these standards, in several respects:

- 19 • The term "opt-out approval" is used and defined in the Federal CPNI Rules and in
20 the Arizona CPNI Rules, but the meaning and use in each are substantially and
21 irreconcilably different.
- 22 • The phrase "Telecommunications-related services" appears in R14-2-2104(A), but
23 the phrase is not defined in the Rules, nor is it defined in the Federal CPNI Rules.
- 24 • R14-2-2107 states that carriers may use "oral notice" to authorize limited, one-time
25 use of CPNI, but the Rule does not offer an explanation of what "oral notice"
26 includes.

1 The sentence "Carriers may request an extension of the verification time period subject to
2 Commission approval" appears twice in R14-2-2108. See R14-2-2108(A), (H). It is not clear
3 whether these statements signify that an individual carrier may petition for extensions of the
4 verification period for individual customers, or that individual carriers may petition for extension
5 of the verification period for all of their customers.

6 **8. Adoption of the Amended Rules Violates the Arizona Administrative**
7 **Procedures Act.**

8 Decision No. 68595 fails the restrictions of A.R.S. §§ 41-1022 and 41-1025 regarding
9 amendments to noticed rule makings, in that the rule provisions adopted are substantially different
10 from the noticed rules. Under A.R.S. § 41-1025, the Commission's new Rule 2108.I constitutes a
11 "substantial change" to the CPNI Rules. As a result, the Commission is required to republish the
12 modified Rules prior to adoption. Specifically, the Commission must comply with A.R.S. § 41-
13 1022.E which requires that when "a proposed rule requires substantial change pursuant to §41-
14 1025, the agency shall issue a supplemental notice containing the changes in the proposed rule."
15 Under §41-1022.E, the Commission also must "provide for additional public comment pursuant to
16 §41-1023." By enacting Rule 2108.I, the Commission has violated Arizona's Administrative
17 Procedures Act under Title 41.

18 Further, Rule 2108.I is confusing and ambiguous, and imposes substantial additional
19 verification requirements on carriers. A couple of examples illustrate that point. Rule 2108.I does
20 not define "best efforts" and it is unclear whether the phone contacts under Rule 2108.I(2) replace
21 or are in addition to the initial opt-out verification notice. Nor is there any guidance on what is
22 "technically feasible" or what "to the extent practicable" means under Rule 2108.I(3), or what
23 "reasonably necessary" means under Rule 2108.I(4). The net result of Rule 2108.I is that carriers
24 will be forced to interpret and apply vague and ambiguous criteria for how a carrier should conduct
25 the verification process under A.A.C. R14-2-2108.

26 Finally, the Commission's CPNI rule making proceeding terminated by statute under
27 A.R.S. § 41-1021 because the Commission did not complete its rulemaking process within the

1 statutory time frame. Under Title 41, the Commission must comply with the general rule making
2 requirements set forth in Article 3 of the Administrative Procedures Act (titled "Rule Making")
3 and set forth at A.R.S. § 41-1021 to 41-1036. A.R.S. § 41-1021 provides:

4 A rule making proceeding is pending from the time the agency begins to consider
5 proposing the rule under section 41-1022 until any one of the following occurs...

6 4. One year after the notice of the proposed rule making is published in the register if the
7 agency has not submitted the rule to the council (the Governor's Regulatory Review
8 Council) for review and approval.

9 This "one year" rule is applicable to rules reviewed by the Attorney General as well as by the
10 Governor's Regulatory Review Council. According to the CPNI Decision, the Commission's
11 notice of CPNI rule making was published in the Register on November 26, 2004. Under A.R.S. §
12 41-1021, this rule making proceeding terminated on November 26, 2005, one year after the notice
13 of the proposed rule making was published in the Administrative Register. After the Attorney
14 General refused to certify the CPNI Rules submitted by the Commission on November 22, 2005,
15 the Commission faced a stale publication date. Under § 41-1021, the Commission then was
16 obligated to republish the new proposed rules in the Arizona Administrative Register to extend the
17 rule making. The Commission was not statutorily authorized to submit the modified CPNI Rules
18 to the Attorney General for certification in March of 2006, sixteen months after the original
19 publication date in the Arizona Administrative Register.

20 CONCLUSION


21 For the reasons set forth above, the Wireless Carriers submit this Application for Rehearing
22 of Decision No. 68595 on the grounds that the Decision is unlawful, unnecessary, unreasonable,
23 unjust, unconstitutional, in excess of the Commission's jurisdiction, arbitrary, capricious and an
24 abuse of the Commission's discretion. The Wireless Carriers also incorporate by reference here
25 the comments that they previously filed in this proceeding: *See Comments of Arizona Wireless*
26 *Carriers Group* filed August 30, 2004; *Comments of Arizona Wireless Carriers Group* filed
27 December 22, 2004; *Exception of Wireless Carriers Group to Recommended Order Urging*

1 *Adoption of CPNI Rules* filed October 8, 2004; and *Exception of Wireless Carriers Group*, filed
2 November 3, 2005.

3 The Commission should rehear and reconsider Decision No. 68595. Instead of adopting
4 Arizona-specific CPNI rules, the Commission should adopt CPNI Rules that are identical to the
5 FCC's CPNI rules.


6 RESPECTFULLY SUBMITTED this 12th day of April, 2006.

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